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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 11

CANADA PACKERS, LIMITED, PETITIONER

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

This brief is submitted by the Interstate Commerce Commission as *amicus curiae* pursuant to Rule 42 of the Rules of this Court, in view of the substantial question of the Commission's statutory jurisdiction over international rates raised by the parties and the United States.

STATEMENT

This appeal raises the question whether the Commission possesses statutory jurisdiction to order the appellee railroad to pay the petitioner, a Canadian shipper, reparation based on the determination that

the joint through rates[1] on various shipments of potash from New Mexico into Canada were unjustly and unreasonably high. Involved are 1948 shipments of potash from Carlsbad and Loving, New Mexico, to several Canadian destinations. The Commission found that the rates assessed exceeded a just and reasonable level by a total of $6,694.56 and awarded the Canadian corporation reparations of that amount. The railroads paid the shipper $5,304.01, the difference representing the share retained by the Canadian railroads for that portion of the transportation that occurred beyond the international boundary. The shipper sued for the difference, and the district court sustained the entire reparations award (R. 33–34). The court of appeals reversed (342 F. 2d 563, R. 36), holding that, since the domestic railroads had on file rates from the involved origins to points on the international boundary,[2] a just and reasonable level of

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[1] The rates here in issue are "through rates" in the sense that they contemplate continuous carriage from origin to destination. They are "joint rates" in the sense that they have been established by two or more carriers as a single charge from origin to destination with each carrier obtaining an agreed-upon "division" of such charge. In the absence of an agreed-upon charge for this transportation, the rates would be "through", but not "joint"; and the several carriers would be required to file "the separately established rates * * * applied to the through transportation" by Section 6(1) of the Act, 49 U.S.C. 6(1). The separately established rates may be "local rates" or "proportional rates," commonly the former. See *Brown & Sons Lumber Co.* v. *L. & N.R. Co.*, 299 U.S. 393, 395.

[2] The reasonableness of rates to the border and to Canada on this same traffic had been decided by the Commission in an earlier proceeding. *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I.C.C. 87.

such domestic rates affords the maximum guide in awarding damages to the shipper. "To conclude otherwise would mean that the defendant railroads would be required to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads which are not parties to this action. Such a result clearly is prohibited by the territorial limitation provisions of section 1 of the Interstate Commerce Act, 49 U.S.C.A. §§ 1, *et seq.*" (R. 40).

INTRODUCTION

The United States, *amicus curiae,* urges that both the court of appeals and the Commission erred. While conceding that "since the American carrier and the foreign carrier have agreed among themselves on a single rate for the entire international journey, they should be deemed jointly liable if the rate is excessive" (Br. 24), it nevertheless advances the proposition that "the Commission has no power to determine what is a reasonable charge for a transportation service performed partly within a foreign country, and hence no power to determine, for reparation or other purposes, when a joint through international rate or a combination of proportional rates for an international rail shipment—in either case a charge involving foreign transportation—is unlawful" (Br. 11–12). It would find the joint through rate excessive as to the domestic railroads only to the extent that the agreed division that they receive exceeds what the Commission may determine to be a just and reasonable level for proportional rates (Br. 12). We disagree.

In our view the Act authorizes the Commission to consider the lawfulness of a joint through rate to or from an adjacent foreign country in accordance with the standards set forth in the Interstate Commerce Act. If relief for the future is asked, the Commission, although it may not prescribe the rate for application in a foreign country, may take the lesser step of issuing an order against the American carrier that requires it to charge a reasonable through rate or cease its participation in the agreed joint rate. If the issue is discrimination, the Commission may enter an order requiring the American carrier to end the discrimination.

If, as in the present case, the shipper seeks only reparation for past injury, the Commission may again consider the entire rate in accordance with the American standard, and compute damages based on the unlawfulness found in the entire joint through rate. The American carrier is liable for the full damage to the shipper on the ground that the American carrier is a joint tortfeasor in the publication and collection of an unreasonable joint through rate for the transportation from origin to destination.

We further believe that even if the Commission's jurisdiction is held to be limited to a consideration of rates, or portions of rates, to the border points, the measure of damages based on divisions agreed upon between the railroads, as proposed by the United States, is improper and unworkable.

ARGUMENT

The United States argues "that the Commission has no power to determine what is an unreasonable charge for a transportation service performed partly within a foreign country * * *" (Br. 11). We believe the statute and its legislative history support the view that the Commission has this power.

Under Section 1(1), the Commission has authority over "carriers engaged in (a) The transportation of passengers or property * * * from or to any place in the United States to or from a foreign country."[3] The section does not grant jurisdiction "to or from border point crossings" but rather "to or from a foreign country." The language of the statute conveys clear authority over foreign commerce.

The proviso on which the United States heavily relies provides that the Commission's jurisdiction extends "only in so far as such transportation takes place within the United States." But this, in our view, means that an order affecting foreign commerce is valid so long as it runs against a carrier performing some transportation within the United States. The proviso limits the personal jurisdiction of the Commission, not its subject matter jurisdiction. Sec-

[3] The limits of jurisdiction are precisely defined by the section as extending to transportation "from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States."

tion 1(1) grants broad authority over foreign commerce; the sole limitation is that valid orders may be issued only against carriers providing transportation within the United States. Our reading is also supported by Section 1(2)(c) of the Act, 49 U.S.C. § 1 (2)(c), which shows that where Congress has wanted to exempt certain carriers that otherwise "would * * * be subject to the provisions of this part" because they perform some land transportation, it has done so expressly.

The United States would limit the Commission to a consideration of only the domestic portion of an indivisible journey to or from a foreign country. Such an interpretation, we submit, would foreclose the very jurisdiction over foreign commerce to which the proviso pertains. Moreover, Section 20(11) of the Act, 49 U.S.C. § 20(11), admittedly extends to the entire transportation with an adjacent foreign country;[4] the United States would apparently recognize that the Commission has jurisdiction to enter a "released rates" order pursuant to this section on the basis of the entire joint through rate, while denying that any other form of order under a different section relating to such transportation is permissible.

The proviso to Section 1(1) on which the United States relies did not appear in the original "Act to regulate commerce," approved February 4, 1887.[5]

[4] See Brief for the United States, p. 25.

[5] 24 Stat. 379.

The original Act was applicable both to foreign commerce and, like the present statute, "from any place in the United States through a foreign country to any other place in the United States." The clause relating to foreign commerce read "from any place in the United States to an adjacent foreign country" (24 Stat. 379).

The Solicitor General seems to be referring to the portion of the history relating to the "through a foreign country" clause, when he states (p. 14, n. 4), that the legislative history of Section 1(1) has to do with "extra-territorial application of the Act * * * in special instances which are not relevant here." However, we believe the footnote overlooks relevant legislative history.

The original Act to Regulate Commerce was applicable to railroads engaged in transportation "from any place in the United States to an adjacent foreign country," without any proviso. In reporting the bill which became the 1887 Act to the Senate floor, Senator Cullum explained:[8]

> While the provisions of the bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, *such as shipments between the United States and adjacent countries by railroad,* and the transportation by railroad of shipments

[8] 17 Cong. Rec. 3472, April 14, 1886.

> between points in the United States and ports of transshipment or of entry when such shipments are destined to or received from a foreign country on through bills of lading. To avoid any uncertainty as to the meaning of these provisions in regard to what may be at the same time in some instances State and foreign commerce, it is expressly provided that the bill shall not apply to the transportation of property wholly within one State and not destined to or received from a foreign country. [Emphasis added.]

Thus, the bill undertook "to regulate foreign commerce so far as interstate shipments by rail are concerned." *Id.* at 3723, April 22, 1886.

The proviso came into the act in the Transportation Act of 1920, 41 Stat. 474. Prior to the 1920 legislation, the entire Commission had held in *Black Horse Tobacco Co.* v. *Illinois Central R.R. Co.*, 17 I.C.C. 588, 590–91, that it had jurisdiction (1) to require American carriers to cease applying an unlawful joint through rate on traffic into Mexico, and (2) to award reparation on the entire through rate, since "every carrier party to a joint rate is jointly and severally responsible for that rate."

The House bill (H.R. 4378) which became the Transportation Act of 1920 confirmed the Commission's jurisdiction over commerce to an adjacent foreign country, and added to the provisions of Section 1 a jurisdiction over traffic "from an adjacent foreign country to any place in the United States."[7] Com-

[7] During the course of the legislative history of the 1920 Act, some carriers were litigating whether the Act (specifically

missioner Clark in testifying for the Commission favored the addition to jurisdiction as follows:[8]

> It is a general provision that puts that transportation under the provisions of this act and makes entirely clear in the statute what we have uniformly held—that we had jurisdiction of that transportation in so far as it was performed within the confines of the United States, and that if the carriers should persist in maintaining a joint through rate which we found to be unduly prejudicial or unjustly discriminatory, we had the *power to require the carrier operating within the United States* to withdraw its concurrence from that joint through rate and establish a reasonable proportional or other rate for the transportation from the boundary to destination in the United States. [Emphasis added.]

The report of the House committee, which added the proviso here in issue, apparently formalized what the Commission had been doing, for it merely stated,[9]

> Section 400 [of the bill] amends the first five paragraphs of section 1 of the commerce act, making minor corrections and clarifying the

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Section 20(11)) applied to traffic *from* a foreign country. The Supreme Court decided that even the language of Section 20(11), in terms of "from the United States to an adjacent foreign country," applied on traffic in the opposite direction. *Galveston, &c. Ry. Co.* v. *Woodbury*, 254 U.S. 357, 359, decided December 13, 1920.

[8] "Return of the Railroads to Private Ownership," Hearings on H.R. 4378 before House Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess., vol. 1, p. 10 (1919).

[9] H. Rep. 456, 66th Cong., 1st Sess., p. 27.

language in several respects, but makes no important change in policy.

Shortly after the passage of the 1920 Act, the entire Commission reiterated its view that it possessed jurisdiction to consider the entire joint through rate in *International Nickel Co.* v. *Director General,* 66 I.C.C. 627. As recently as 1962, the Commission reported to Congress its interpretation of the jurisdictional provisions of Section 1(1), including the proviso language. Commissioner Murphy, for example, then testified before the Senate Committee on Commerce that the Commission had often held that it could not prescribe international rates. He continued as follows:[10]

> The Commission, however, has many times held, as in the cited case, that where a U.S. railroad enters into through route and joint rate arrangements with foreign railroads, it will be held responsible for the lawfulness of the through rate, both with respect to reparation for past unreasonable rates and as to rates for the future. The decisions indicate that if the foreign railroads are unwilling to establish joint through rates on the basis found to be lawful, it is the duty of the U.S. carrier to withdraw from the joint rates and establish rates to and from the boundary which are just, reasonable, and otherwise lawful.
>
> The CHAIRMAN Well, what if the carrier does not do it?

[10] "Problems of the Softwood Lumber Industry," Hearings before the Senate Comm. on Commerce, 87th Cong., 2d Sess., Part I, p. 129 (1962); see also Part IV, p. 972.

> Mr. MURPHY. You mean the——
>
> The CHAIRMAN. Well, you say it is the duty of the U.S. carrier to withdraw from the joint rates and establish rates to and from the boundary that are just and reasonable and lawful. What if the carrier does not do it?
>
> Mr. MURPHY. The Commission can, on a proper record, order them to do that.

In the forty-six years since the enactment of the Transportation Act of 1920, both Congress and the railroads have acquiesced in the views of the Supreme Court and of the ICC that the Commission possesses jurisdiction to order reparation based upon an entire joint through rate between the United States and Canada. The Act has been amended numerous times, including the major codification and revision in the Transportation Act of 1940, 54 Stat. 898, but no question has been raised concerning the Commission's consistently asserted jurisdiction over such rates.[11]

The Commission finds nothing anomalous in its considering the reasonableness of the entire joint rate, a single charge to the shipper and the only rate that legally may be charged when it is filed.[12] The Inter-

[11] An established and unvarying administrative interpretation of a statute acquiesced in for many years, will not be overturned except for cogent reasons. *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *Public Utilities Com'n.*, 345 U.S. 295, 314–15; *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 179.

[12] We further see no "apparent implication" (Br. of U.S., p. 21, n. 9) of the Court's opinion in *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, discussed hereinafter, that somehow American carriers may file more than one rate and give the shipper a choice. The Court plainly stated that the joint rate was there charged since no rate to the border was

state Commerce Act attaches to such transportation by its terms, a matter no more anomalous than the fact that the antitrust laws apply to conduct of American corporations in foreign countries (*e.g., Continental Co.* v. *Union Carbide,* 370 U.S. 690, 704, 706).

American carriers are held liable for the entire unlawfulness inherent in an international joint rate, since they are joint tortfeasors in the promulgation and charging of such rates. The collection of an unreasonable charge is a tort (*Adams* v. *Mills,* 286 U.S. 397, 407); and "the general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines" (*Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U.S. 654, 660).[13]

(or could be) legally "applicable" after the filing of the joint rate. (275 U.S. 179, 187). And see *Cyanamid and Cyanide From Niagara Falls,* 155 I.C.C. 488, 491.

[13] In *Great Northern* v. *Sullivan,* 294 U.S. 458, the Court refused to permit a shipper to show the unlawfulness inherent in a proportional rate to the border point, holding that the Commission must determine whether the entire charge is unreasonable. Notwithstanding *Atlantic Coast Line R. Co.* v. *Smith Bros. Inc.,* 63 F. 2d 747, 748 (C.A. 5), certiorari denied, 289 U.S. 761; and *Atlantic & Y. Ry. Co.* v. *Carolina Button Corp.,* 74 F. 2d 870 (C.A. 4), the Commission has applied *Sullivan* only where the combination rates are made up of proportional rates and not where they are made up of local rates. See *Yellow Jacket Boat Co., Inc.* v. *A.T. & S.F. Ry. Co.,* 305 I.C.C. 113, 116–17. It is not clear from the cases cited by the United States (Br., p. 16) whether the combination rates there considered were composed of locals or proportionals, except in *Western Peat Co.* v. *Illinois Central R. Co.,* 297 I.C.C. 273. But the *Western Peat* proportional only related to a technical

Just as in *H. K. Porter Co.* v. *Central Vermont R. Co.*, 366 U.S. 272, involving a finding of preference and prejudice based upon the entire joint through rate, the orders in *News Syndicate* and *Lewis-Simas-Jones*, contrary to the position of the United States (p. 15, n. 5) similarly "affected only the American part of the transportation." In all three cases the entire joint through rate was considered and the order so drawn as to run only against carriers performing some transportation within the United States.

The Commission has consistently refrained from prescribing joint through rates (Br. for the U.S., p. 18, and cases cited).[14] Its orders run exclusively against carriers engaged in transportation in the United States, and hence it is without authority to require Canadian or Mexican carriers to agree on joint rates to or from their countries. To prevent unlawfulness in the future, the Commission will issue a cease and desist order requiring American carriers to cease preference and prejudice, as in the *H. K. Porter Co.* case, or to end participation in unreasonably high joint rates unless such rates be voluntarily reduced.[15] The Commission has not in any manner

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question under Section 4 of the Act, rather than jurisdiction under Section 1; and it further reached a result consistent with a similar interpretation by a Canadian court, as discussed in footnote 18, *infra*.

[14] The Canadian Board has taken a similar position concerning its authority. See *West Lorne Lbr. Co.* v. *Canadian Pacific Railway*, 70 C.R.T.C. 23, 31 (1953).

[15] *Black Horse Tobacco* case, *supra*; *Spanish River Pulp & Paper Mills* v. *A. & W. Ry. Co.*, 120 I.C.C. 251, cited in *News Syndicate*; *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, 492, and cases cited; *Federated Metals Corp.* v.

directly interfered with the jurisdiction of any foreign government.

The United States would authorize the Commission to determine the lawfulness of the rate to the border, and compel the shipper to seek reparation in Canada for that part of the transportation service which occurred in Canada. The anomaly of the position appears in the fact that (1) the law of Canada recognizes the ICC's jurisdiction over an entire joint through rate, and (2) the agencies and courts of Canada exercise an identical concurrent jurisdiction over the entire joint rate when suit is brought in that forum. The position of the United States would disrupt the rule of international conflict of laws recognized in this field by Canada, and deny to the Commission the concurrent jurisdiction over the entire joint rate exercised by the Canadian Board of Transport Commissioners.[16]

In the first "Stoy" case[17] before the Canadian Board, the American carrier had filed a "joint tariff" setting forth one through rate on petroleum and its products from Stoy, Indiana, to Canada. The con-

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Pennsylvania R. Co., 185 I.C.C. 399; *Sherman Lbr. Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 261, 263, 264; *Chas. H. Lilly Co.* v. *Great Northern Ry. Co.*, 298 I.C.C. 407, 410.

[16] The Canadian Board is without power to order reparation. It may issue a declaratory order stating what the lawful rate was or should have been, but recovery, if any, can be obtained only through the courts, pursuant to Section 385 of the Railway Act, R.S.C., 1927, ch. 170. See *Brown Motor Co.* v. *Canadian Pac. Ry.*, 75 C.R.T.C. 230, 236 (1957); *Canadian Shippers' Traffic Bur.* v. *Canadian National Ry.*, 32 C.R.C. 3, 6 (1926).

[17] *British American Oil Co.* v. *Grand Trunk Ry. Co.*, 9 C.R.C. 178 (1909).

necting railroad in Canada (Grand Trunk Ry. Co.) filed an "exception" to the tariff, stating it did not concur, and that its local rates would apply from the border. The Board of Railway Commissioners For Canada (now Board of Transport Commissioners) applied Canadian law to the entire rate, holding:

1. With respect to the exception, "whatever effect that may have had in the United States, it can have none here. The procedure provided by the [Canadian] Railway Act must govern.". It further stated, "We cannot introduce here, or follow the practice established in the United States regarding 'exceptions,'" which violate Canadian law (p. 183).

2. A subsequent filing by the American carrier is also of no effect, since, unlike the United States law, "once a joint tariff is filed, unless it is dissallowed, it remains in force until replaced by another joint tariff, and it is not open to the carrier filing it to destroy its effect by filing a supplement alleging that the sum of the locals shall be substituted for the joint through rate" (p. 187).

3. The "only legal rate from Stoy to Toronto" was the originally filed joint rate (*ibid.*); the Grand Trunk "should be at liberty to refund the difference between that sum and the amount collected" (p. 190).

The Board's decision was sustained by the Supreme Court of Canada, *sub nom. Grand Trunk R.W. Co.* v. *British American Oil Co.*, 43 S.C.R. 311, 11 C.R.C. 118 (1910). The Canadian Board later followed this decision in the second "Stoy" case, *British American Oil Co.* v. *Canadian Pacific Ry. Co.*, 12 C.R.C. 327 (1911), noting that respondent alleged that its United

States connections "have refused to join in any refunds" since the rates charged were the legal and proper rates under the Interstate Commerce Act. The Board stated (p. 333):

> It does not seem that we can enter into consideration of the effect of what was done in the United States, or under the laws there; whether the carriers there have refused to join in refunds, or whether they are morally entitled to do so or not.

Recently, a Canadian court has specifically recognized the concurrent jurisdiction of the Commission, stating, "As to rates for routes from the United States of America into Canada, the Interstate Commerce Commission has authority to consider the entire route and the rate therefor." *Direct Winters Transport Ltd.* v. *Duplate Canada Ltd.*, 83 C.R.T.C. 54, 68 (1962).[18]

The United States would limit the shipper's recovery against the United States carrier to an amount by which a hypothetical rate to the border exceeds the division agreed upon between the United States and the foreign carrier. If a joint rate is published, such rate takes precedence over any combination of rates. Any rate to the border would be only a hypothetical

[18] At the same time the Canadian Court held that the sum of Canadian and United States factors (locals or proportionals) may not be compared to the joint through rate published in an ICC tariff in determining whether the latter rate is higher than the "aggregate of intermediate rates," and hence a violation of Section 4 of the Interstate Commerce Act. 83 C.R.T.C. at 68. The ICC had made the identical interpretation of the requirements of Section 4 in the *Western Peat* case. footnote 13, *supra*.

rate for the service in question. The rates to the border would not necessarily provide the proper measure of the joint rate, since they might be filed with some other use in mind in forming through rates.

The United States assumes, we think improperly, that the shipper's recovery should be limited by the amount received by the American carrier. This Court rejected such an argument in *News Syndicate,* holding that the shipper is entitled to recover his damages sustained in consequence of the carrier's failure to make or publish a lawful rate. The shipper's "right to reparation does not depend upon the amounts retained by defendants in error [the railroads] pursuant to agreed divisions" (275 U.S. at 187). The shipper's theory of recovery is actual damages, not *quantum merit.*

Although divisions may be useful as evidence of the reasonableness of the rates charged,[19] they are not conclusive, for they are governed by statutory standards totally different from those applicable to rates. Under Section 1(4) rates must be just and reasonable, and Section 15a(2) directs the Commission to consider certain specific standards; neither section applies to divisions between carriers. The latter are governed by the standards of Section 15(6), which requires, among other things, consideration of any facts or circumstances which entitle one carrier to

[19] For example, if the railroads have evidence that conditions in Canada require relatively higher rates, they should present such evidence to the Commission for its consideration. See *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, 497. No such evidence appears in the present record.

more or less than another carrier to a given division. Section 15(6) does not and cannot be made to govern the limit of a shipper's recovery for damages occasioned by unlawful carrier conduct in foreign commerce.

CONCLUSION

In the more than fifty years since the Commission's decision in the *Black Horse* case, there has been no evidence that the Commission's jurisdiction to consider the lawfulness of an entire joint through rate in foreign commerce has either discouraged the publication of such rates or in any way affected our relations with Canada or Mexico. On the contrary, the Canadian Board simultaneously exercised a concurrent jurisdiction in the *"Stoy"* cases when *Black Horse* was decided. And we are unable to find a single American or Canadian case involving a suit between an American and Canadian (or Mexican) railroad for contribution. This indicates to us that American carriers are consistently able to obtain contribution through informal channels when held liable as joint tortfeasors for the unlawfulness in the entire international rate.

In contrast to the apparent ease with which the American carriers over a very long period have amicably settled their relative liability for reparations with their foreign counterparts, the approach of the United States would increase the burden of shippers seeking to obtain reparation. The shipper would be required to bring separate suits in the United States and in Canada, a procedure that we doubt would be

feasible to obtain a small award, such as is involved in the present case.

We submit that no legal or practical need has been shown for reversal of the long-standing decisions of this Court governing international rates. The court of appeals erred in holding that the railroads had "met the burden of proving" the rates from New Mexico to the border points, and that such rates "must be considered as maximum guides in awarding damages to plaintiff" (Canada Packers) (R. 40). We submit that the decision of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted.

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SEPTEMBER 1966.

I authorize the filing of the foregoing brief.

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Solicitor General.

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